STATE OF MICHIGAN

COURT OF APPEALS

WARNICKE & ASSOCIATES, INC.,

Plaintiff-Appellant,

v

QUIK DRIVE USA, INC.,

Defendant-Appellee,

and

FASTENERS, INC.,

Defendant.

UNPUBLISHED
October 29, 1999

No. 206479
Wayne Circuit Court
LC No. 96-634524 CZ

Before: Markey, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant, Quik Drive USA, Inc. (hereinafter Quik Drive), pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

Plaintiff is an independent manufactures sales representative, with offices located in Keego Harbor, Michigan. Quik Drive, whose principal place of business is located in Tennessee, manufactures various fasteners and fastener tools. In August 1993, plaintiff's president met with a Quik Drive vice president at a hardware trade show in Chicago, Illinois. The two men entered into an oral agreement pursuant to which plaintiff began acting as a sales representative for Quik Drive in Michigan. Subsequently, the parties exchanged two letters addressing the nature of their business relationship. The first letter, dated August 25, 1993, and sent by Quik Drive to plaintiff, states in pertinent part:

> It is my understanding that [plaintiff] will represent QUIK DRIVE in the state of Michigan to lumber yards and may be open to expand into other markets. We can discuss this in the future. [Plaintiff] has no interest in existing business, will not service existing accounts and therefore will not receive commission on existing accounts. This is open for discussion at a later time if necessary and adjustments could be made. QUIK

> DRIVE will pay 10% commission on new accounts for 120 days and 7% commission thereafter. . . .

In a letter dated May 19, 1994, plaintiff responded in pertinent part:[1]

> Additionally, this letter is to confirm our agreement as reflected in your August 25, 1993 letter. We agree that we will be paid a commission at the rate of 10% on new accounts for 120 days and 7% commission thereafter. It is understood that our primary responsibility is to obtain new accounts or new customers for Quik Drive.

For approximately the next two and one-half years, the relationship proved profitable for both parties. Then in April 1996, Quik Drive sent a letter to plaintiff terminating their association. Thereafter, plaintiff flied suit against Quik Drive, alleging, in part, that it was due post-termination commissions. In an amended complaint, plaintiff added a count seeking damages pursuant to MCL 600.2961; MSA 27A.2961. The trial court granted Quik Drive's motion for summary disposition finding that the language of the parties' contract did not provide for "life-long commissions on sales to new accounts procured by plaintiff." The court further found that plaintiff "failed to produce evidence to support his claim for post-termination commissions."[2]

"This Court reviews decisions on motions for summary disposition de novo." *Auto Club Ins Ass'n v Sarate*, ___ Mich App ___; ___ NW2d ___ (Docket No. 204893, issued 06/25/99), slip op at 1.

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994). In searching for the parties' intent, we first look to the language of the contract. *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406; 29 NW2d 832 (1947). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). "The initial question whether contract language is ambiguous is a question of law." *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). If the contractual language is either unclear or is reasonably susceptible to different interpretations, then it is considered ambiguous. *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). When the language is ambiguous, interpretation of the contract becomes a question for the trier of fact, "and summary disposition is

therefore inappropriate." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

Plaintiff argues that summary disposition was inappropriate because there is a genuine issue of material fact with regard to the issue of post-termination commissions. Plaintiff argues because the parties' contract does not contain any express provision dealing with post-termination commissions, the issue is governed by the procuring cause doctrine. Quik Drive counters that plaintiff's failure to immediately object to the statement in Quik Drive's April 25, 1996 termination letter that commissions would only be paid through the effective date of termination evidences the parties' agreement that there would be no post-termination commissions. The parties agree that there is no express provision in the contract governing the payment of post-termination commissions.

We conclude that the trial court erred in granting Quik Drive's motion for summary disposition. We do not agree with Quik Drive's assertion that plaintiff's failure to immediately object to the terms set forth in the termination letter means that there is no genuine issue of material fact regarding post-termination commissions. Further, contrary to Quik Drive's assertions, plaintiff's July 1996 letter does not necessarily imply that plaintiff recognized the May 1996 commission check as being the "final" commission check due. In the letter, plaintiff requests that Quik Drive send to plaintiff the "commission payment for May 1996 sales." Even in the circumstances of this case, the request for commissions believed due for a particular month does not necessarily imply a recognition that those are the only commissions due.

We also believe a genuine issue of material fact exists with regard to the type of contract that existed. An agent and a principal can expressly contract for commissions to be paid for customer procurement or sales procurement. We find the following discussion of the difference between the two types of arrangements instructive: "Customer procurement allows an agent to recover a commission for all sales to a customer that the agent procured regardless of whether the agent was involved in the particular sale. Sales procurement allows an agent to recover a commission only on the specific sales that the agent procures." *Lilley v BTM Corp*, 958 F2d 746, 751 (CA 6). Both Quik Drive's August 1993 letter and plaintiff's May 1994 response speak of the acquisition of "new accounts" and the commissions that will be paid on those accounts. We believe that it is reasonable to interpret this language as setting forth either a customer procurement or sales procurement arrangement.[3]

If the parties did intend a customer procurement arrangement, we also believe a genuine issue of fact remains concerning whether post-termination commissions are due under the procuring cause doctrine. Traditionally, the doctrine provided that in the absence of an express contractual provision addressing post-termination commissions, an

> agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. . . . [I]f the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. [*Reed v Kurdziel*, 352 Mich 287, 294-295; 89 NW2d 479 (1958).

In *Militzer v Kal-Die Casting Co*, 41 Mich App 492; 200 NW2d 323 (1972), the perameters of the doctrine were expanded to include customer procurement contracts. Under *Militzer*, an agent working pursuant to a customer procurement contract would be entitled under the procuring cause doctrine to post-termination commissions on all reorders for products which were first procured by plaintiff before the termination date. *Id.* at 496. This is in keeping with the goal of "fair dealing" enunciated by the Court in *Reed*. *Reed, supra* at 294.

Finally, plaintiff contends that the trial court erred in summarily dismissing its claim brought under MCL 600.2961; MSA 27A.2961. We agree. We do not believe that the state of the record is such as to warrant granting summary disposition on this issue.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] The May 1994, letter also indicates that prior to that date, plaintiff had actually been working as Quik Drive's Michigan sales representative prior to the drafting of that letter.

[2] The parties reached agreement on a separate breach of contract claim. That claim, as well as plaintiff's allegations against defendant Fasteners, are not a part of this appeal.

[3] Indeed, in its August 1993 letter, Quik Drive notes that plaintiff will not be "servic[ing] existing accounts and therefore will not receive commission on existing accounts." The distinction drawn between "existing accounts" and "new accounts" can reasonably be read as indicating that plaintiff was being employed to find new customers for Quik Drive.